

Dasar Karisma Sdn Bhd v Zambina Wawasan Sdn Bhd

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HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22NCVC-85 OF
2011

VARGHESE GEORGE J

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23 APRIL 2012

Contract — Building contract — Breach — Failure to pay progress claims — Whether proven — Whether plaintiff stopped subcontracted works after October 2008 — Whether plaintiff contractually entitled to overtime payment — Whether plaintiff entitled to variation of price claims — Whether defendant wrongfully withheld claims for overtime and variation of price

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Evidence — Burden of proof — Whether plaintiff successfully discharged its burden — Whether plaintiff proven its case against defendant on balance of probabilities — Evidence Act 1950 ss 101, 102 & 103

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The Kementerian Pelajaran Malaysia awarded the defendant a RM16.3m contract to construct a school ('the project'). The defendant appointed the plaintiff as its subcontractor for a subcontract price of RM 3.05m. The terms and scope of work of the plaintiff, subcontractor, were evidenced in a specific document referred to as the letter of acceptance for construction and completion of building works ('the letter of acceptance') issued by the defendant and accepted by the plaintiff. The plaintiff claimed that it had not been paid for works undertaken and completed under the subcontract in the sum of RM1,343,857.25. According to the plaintiff, it had raised progress claims on a cumulative basis for the value of the works it had carried out and that the defendant had failed to pay four such progress claims, namely progress claim Nos 10, 11, 12 and the final progress claim. The plaintiff further claimed that the defendant had wrongfully withheld claims for such items as overtime and variation of price. The plaintiff thus filed the present claim for the non-payment of the subcontracted works of RM1,343,857.25 with interest and costs. In its defence the defendant pleaded that the sums certified for payment prior to progress claim No 10 had always been promptly paid and that there had also been a partial payment of claim No 10. However, the defendant contended that the plaintiff had not carried out any works on the project to justify its claims under progress claims Nos 11, 12 and the final progress claim. The main thrust of the defendant's defence was that there was no evidence of the plaintiff progressing with the subcontract works after October 2008. In reply the plaintiff insisted that it had continued to undertake its obligations under the subcontract despite progress claim No 10 not being appropriately certified and paid. Although the plaintiff admitted that the works on the

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A project had been suspended in early October 2008, it maintained that it had continued with the subcontracted works after that suspension.

Held, dismissing the claim with costs fixed at RM25,000:

- B (1) The plaintiff had to adduce evidence to show that when the suspension
C was lifted it had continued with the subcontracted works to justify any
D further payment under progress claims Nos 11, 12 or even the final
E progress claim. There was no merit in the plaintiff's contention that it
was justified in suspending works as there was a delay in certification or
payment on their progress claims. In the circumstances of this case, it was
not enough for the plaintiff to just produce progress claim Nos 10–12
and the final progress claim and contend that the onus was now on the
defendant to disprove them. In the context of the outright denial by the
defendant of the plaintiff's claims it was incumbent upon the plaintiff to
prove its case. In all the circumstances of the case and by virtue of
ss 101–103 of the Evidence Act 1950 it was always for the plaintiff to
satisfy the court that it had not abandoned the subcontracted works in
October 2008 and that it had resumed the suspended subcontracted
works. However, there was no such proof adduced by the plaintiff and it
was found that the plaintiff had failed to prove its case on a balance of
probabilities against the defendant (see paras 14–15, 20 & 32–33).
- F (2) As for the plaintiff's claim denoted as 'overtime' in progress claim No 10
and subsequent progress claims, there was no express term in the letter of
acceptance which entitled the plaintiff to be paid any 'overtime'. Instead
it was found that the plaintiff had carried out overtime work to recover
programmed works that had been delayed, and that such overtime work
should not give rise to an independent or lawful right to be compensated.
Thus, non-payment of 'overtime' claim was not a tenable ground for the
plaintiff suspending or abandoning the subcontracted works in October
2008 in any case (see paras 21, 23 & 25).
- H (3) The plaintiff's entitlement to 'variation of price' was only on a prorated
basis and was subject to the defendant's overriding right to contra monies
due to the defendant upon the settlement of the final accounts as between
the plaintiff and the defendant in respect of this subcontract. As such, the
plaintiff's claim for variation of price of materials was premature at this
stage. Further, this was not a lawful basis for the plaintiff to suspend the
subcontracted works as it had in October 2008 (see paras 30–31).

I **[Bahasa Malaysia summary]**

Kementerian Pelajaran Malaysia mengawardkan defendan kontrak RM16.6 juta untuk membina sebuah sekolah ('projek tersebut'). Defendan melantik plaintif sebagai subkontraktornya untuk subkontrak berharga RM3.05 juta. Terma dan skop kerja plaintif, subkontraktor, diterangkan dalam dokumen

spesifik yang dirujuk sebagai surat penerimaan untuk pembinaan dan penyiapan kerja pembinaan ('surat penerimaan tersebut') yang dikeluarkan oleh defendan dan diterima oleh plaintif. Plaintif mendakwa yang ia tidak dibayar untuk kerja-kerja yang dijalankan dan disiapkan di bawah subkontrak untuk jumlah RM1,343,857.25. Menurut plaintif, ia mengemukakan tuntutan prestasi atas dasar kumulatif untuk nilai kerja yang dijalankannya dan bahawa defendan telah gagal membayar empat tuntutan prestasi, iaitu tuntutan prestasi No 10, 11, 12 dan tuntutan prestasi terakhir. Plaintif selanjutnya mendakwa bahawa defendan dengan salah menahan tuntutan untuk item seperti lebih masa dan pengubahan harga. Plaintif dengan itu telah memfailkan tuntutan ini untuk kerja subkontrak yang tidak dibayar berjumlah RM1,343,857.25 dengan faedah dan kos. Dalam pembelaannya defendan memplid bahawa jumlah yang disahkan untuk bayaran sebelum tuntutan prestasi No 10 telah sentiasa dibayar dengan segera dan terdapat juga bayaran sebahagian tuntutan No 10. Walau bagaimanapun, defendan berhujah bahawa plaintif tidak menjalankan apa-apa kerja ke atas projek tersebut untuk menjustifikasikan tuntutannya di bawah tuntutan-tuntutan prestasi No 11, 12 dan tuntutan prestasi terakhir. Teras terakhir pembelaan defendan adalah tidak terdapat keterangan plaintif menunjukkan kemajuan dalam kerja subkontrak selepas bulan Oktober 2008. Dalam jawapan plaintif bertegas bahawa ia berterusan menjalankan tanggungjawabnya di bawah subkontrak tersebut meskipun tuntutan prestasi No 10 tidak disahkan sewajarnya dan dibayar. Walaupun plaintif mengakui bahawa kerja-kerja ke atas projek tersebut ditangguhkan awal bulan Oktober 2008, ia mengekalkan bahawa ia telah meneruskan kerja-kerja subkontrak tersebut selepas penangguhan tersebut.

Diputuskan, menolak tuntutan dengan kos ditetapkan pada RM25,000:

- (1) Plaintif telah mengemukakan keterangan untuk menunjukkan bahawa apabila penangguhan itu ditarik balik ia meneruskan kerja-kerja subkontrak tersebut untuk mewajarkan apa-apa tuntutan prestasi No 11, 12 ataupun tuntutan prestasi terakhir. Tiada merit dalam hujah plaintif bahawa ia dijustifikasikan daripada menangguhkan kerja-kerja tersebut kerana terdapat kelewatan dalam pengesahan atau pembayaran tuntutan-tuntutan prestasi mereka. Dalam keadaan kes ini, tidak mencukupi untuk plaintif hanya mengemukakan tuntutan-tuntutan prestasi No 10–12 dan tuntutan prestasi terakhir dan berhujah bahawa beban sekarang terletak pada defendan untuk membuktikannya. Dalam konteks penafian nyata oleh defendan terhadap tuntutan-tuntutan plaintif maka adalah wajib untuk plaintif membuktikan kesnya. Dalam semua keadaan kes dan menurut ss 101–103 Akta Keterangan 1950 plaintif hendaklah sentiasa meyakinkan mahkamah bahawa ia tidak meninggalkan kerja-kerja subkontrak tersebut dalam bulan Oktober 2008 dan bahawa ia telah menyambung kerja-kerja subkontrak yang

- A ditangguhkan tersebut. Walau bagaimanapun, tiada bukti dikemukakan oleh plaintif dan ia mendapati bahawa plaintif telah gagal untuk membuktikan kesnya atas imbalan kebarangkalian terhadap defendan (lihat perenggan 14–15, 20 & 32–33).
- B (2) Oleh sebab tuntutan plaintif ditafsirkan sebagai ‘overtime’ dalam tuntutan prestasi No 10 dan tuntutan-tuntutan prestasi seterusnya, tiada terma nyata dalam surat penerimaan yang memberi hak kepada plaintif untuk dibayar apa-apa ‘overtime’. Sebaliknya ia mendapati bahawa
- C plaintif telah menjalankan kerja lebih masa untuk memulihkan perancangan kerja-kerja yang tertangguh, dan bahawa kerja lebih masa tidak patut menimbulkan hak berasingan atau sah untuk diberi pampasan. Oleh itu, tuntutan ‘overtime’ yang tidak dibayar bukan alasan yang dapat dipertahankan untuk plaintif menangguhkan atau
- D meninggalkan kerja-kerja subkontrak dalam bulan Oktober 2008 dalam apa-apa keadaan pun (lihat perenggan 21, 13 & 25).
- E (3) Hak plaintif untuk ‘variation price’ hanya pada kadar pro rata dan tertakluk kepada hak defendan menolak wang kontra yang perlu dibayar kepada defendan setelah penyelesaian akaun akhir antara plaintif dan defendan berkaitan subkontrak ini. Oleh itu, tuntutan plaintif untuk
- F pengubahan harga untuk bahan-bahan adalah pramatang di peringkat ini. Selanjutnya, ini bukan asas yang menyalahi undang-undang untuk plaintif menangguhkan kerja-kerja subkontrak sebagaimana dilakukannya dalam bulan Oktober 2008 (lihat perenggan 30–31).]

Notes

For cases on breach, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3276–3303.

- G For cases on burden of proof, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 397–743.

Legislation referred to

Evidence Act 1950 ss 101, 102, 103

- H *Subash Hassan (N Ahilan and Siti Nur with him) (Hasan Subra & Associates) for the plaintiff.*
Peter Miranda (Peter Miranda & Co) for the defendant.

- I **Varghese George J:**

[1] After a full trial, I had dismissed the plaintiff's action with costs, since in my assessment of the evidence led before me, the plaintiff had failed on a

balance of probabilities to prove their claim brought against the defendant.

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BACKGROUND

[2] The plaintiff was a subcontractor appointed by the defendant ('the main contractor') in respect of a contract to construct and complete a school at Guar Perahu 2, Seberang Perai Tengah, Pulau Pinang for Kementerian Pelajaran Malaysia ('Kementerian'). The contract value for the defendant's main contract with the Kementerian was for RM16.3m.

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The plaintiff's subcontract was however only in respect of completion of six out of a total of eight 'Bangunan' in the project for a subcontract price of RM3.05m.

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[3] The plaintiff had replaced a previous subcontractor on the job. Nevertheless the terms and scope of works of the plaintiff's subcontract was evidenced in a separate and specific document, namely, the 'Letter of Acceptance for Construction and Completion of Building Works' dated 25 September 2007, issued by the defendant and accepted by the plaintiff (pp 1–6 — *bahagian A*, CABD1).

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By all appearances, this subcontract was a lump-sum contract whereby the contacted sum was to be paid progressively depending on the actual state of works carried out. It was not a 'remeasurement' or a 'revaluation' building contract, as recognised in the industry.

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It was a term of the contract between the parties (see item 3 of the letter of acceptance of 25 September 2007) that the date for the commencement of the subcontracted works was to be 24 September 2007 and completion by the plaintiff was scheduled to be the 23 July 2008.

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[4] In the statement of claim filed by the plaintiff in this claim, the judgment sought against the defendant were for as follows:

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- (a) Jumlah sebanyak RM1,343,857.25 yang terhutang setakat 20/09/2010;
- (b) Faedah pada kadar 8% setahun atas jumlah RM1,343,857.25 daripada tarikh notis diberikan dan saman difailkan [sic] sehingga Penghakiman;
- (c) Faedah pada kadar 8%setahun atas jumlah RM1,343,857.25 daripada bertarikh saman difailkan dan Penghakiman penyelesaian penuh[sic];
- (d) Kos;
- (e) Perintah perintah lain atau serlanjutnya.

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THE PLAINTIFF'S CONTENTION

[5] The plaintiff's case basically was that they had not been paid for works undertaken and completed under the subcontract.

- A** The details and the workings of how this alleged outstanding sum of RM1,343,857.25 was derived was provided at para 3 of the statement of claim under the heading 'Butir Butir Ringkas'. The contents of *butir-butir ringkas* was a replication of the final progress payment claim dated 20 September 2010 submitted by the plaintiff under cover of a letter of same date (at P1B (CABD2, p 2) to the defendant.
- B**

[6] There was no issue raised in respect of the certification and payment by defendant of plaintiff's progress claims Nos 1–9, related to the subcontracted works carried out.

- C** The controversy that surfaced at the trial of this action revolved around the subsequent progress claims of the plaintiff raised for payment, namely:

(a) No 10 (on 22 September 2008);

- D** (b) No 11 (on 21 October 2008);

(c) No 12 (on 12 January 2009); and

(d) 'Final' (on 22 September 2010).

- E** The plaintiff alleged that progress claim No 10 was only partially paid for by the defendant and the others remained unpaid.

It was also contended by the plaintiff that the plaintiff's claims for 'overtime' and for 'variation of price' (VOP) should have been allowed for payment as claimed. The deduction or the withholding of sums claimed (by plaintiff) under those items was wrongfully done by the defendant, it was alleged.

- F**
- (All progress claims were drawn up on a cumulative basis for value of works carried out allegedly up to the respective dates stated and the net amount claimed or shown to be outstanding and due in each of the progress claims was after deduction of previous payments made on the subcontract.)
- G**

THE DEFENDANT'S RESPONSE

- H** [7] The defendant took pains to point out that the plaintiff had been consistently behind schedule in the progress of the works, even going by the plaintiff's own recovery programme to accelerate delayed works, and that the plaintiff had been issued various notices to that effect from as early as December 2007.

- I** [8] The defendant maintained that the sums certified for payment prior to progress claim No 10 of the plaintiff had been always promptly paid. Even in respect of the plaintiff's progress claim No 10 submitted on 22 September 2008, the payment of the certified sum of RM83,026.68 was effected on 26 September 2008 itself. The certification of what was allowed on the claims

or amount payable with reference to the works completed was made by relevant consultants/engineers under the terms of the main contract.

In the case of progress claim No 10, the plaintiff had put forward an assessment for cumulative value of work completed at RM1,813,318.01 and a claim for payment (after deduction of previous payments received) of a sum of RM787,757.43. The certification for payment issued in respect of progress claim No 10 was *SPC No 10* (D 8) (26 September 2008) and a comparison of these two documents showed that two major items of claim by the plaintiff that was not allowed was 'variation of price' (claimed: RM625,398.75 — allowed RM50,004.31 only) and 'overtime' (claimed: RM24,736.64 — allowed nil). In respect of the value of completed works, there were adjustments, in some cases upwards and in some cases downwards, to that assessed and claimed by the plaintiff in progress claim No 10.

[9] The main plank of the defendant's defence to the plaintiff's claim was however that the plaintiff had in early October 2008 completely stopped works at the site. It was contended that no further works had been undertaken by the plaintiff under the subcontract to justify in any manner the plaintiff's further claims, namely:

- (a) under *progress claim No 11* (21 October 2008) where purportedly the value of executed works was stated to have cumulatively increased to RM1,869,397.94;
 - (b) under *progress claim No 12* (12 January 2009) where the value of executed works is claimed to have increased cumulatively further to RM2,394,140.55; and
 - (c) under the *progress claim—'final'* (22 September 2010) where total value of executed works was claimed by the plaintiff to be RM2,529,888.75.
- It will be noted that the *progress claim—'final'* was issued some *two years after the alleged cessation of the subcontract works* by the plaintiff.

[10] It was the defendant's contention that there was no evidence whatsoever of the plaintiff progressing with the subcontract works after October 2008. Prior to September 2008, the defendant had been largely assisted by 'machinery on behalf, material on behalf and 'advances' provided by the plaintiff (and set off subsequently against progress claims/certified payments). It was argued that a comparison of these items in progress claims Nos 11–12 and Final show clearly that there has been no increase to these items at all. It was the defendant's submission that since the plaintiff depended on such assistance to carry out their work and in the absence of such assistance reflected in the progress claims Nos 11–12 and final, accordingly the plaintiff's claim in this

A action was also further baseless and ‘false’.

ISSUES

B [11] As against the aforesaid backdrop, in my assessment, there arose therefore one primary and two subsidiary issues for determination by the court. The said issues, were:

C Primary Issue: Did the plaintiff continue and undertake any aspect of the subcontracted works after October 2008? This was a factual question.

D Subsidiary Issue 1: Was the plaintiff contractually entitled to any ‘overtime’ payment as claimed?

D Subsidiary Issue 2: Was the plaintiff entitled to any ‘variation of price’ adjustments/claims as presented by the plaintiff.

PRIMARY ISSUE

E [12] The plaintiff’s main stance was that they did not abandon the subcontracted works in early October 2008, although they were dissatisfied that their claims under progress claim No 10 had not been appropriately certified and paid to them.

F The plaintiff insisted that they continued to undertake their obligations under the subcontract subsequent to October 2008 and the progressive increases in the value of work set out in their progress claims Nos 11–12 reflected what was indeed completed works up to those respective dates.

G [13] The plaintiff however did not deny the fact that they had written to the defendant and by a letter of 4 October 2008 had stated as follows:

Sekiranya pihak tuan gagal menyelesaikan tuntutan kami maka kami akan memberhentikan sementara kerja kerja di tapak.

H The plaintiff’s main witness, PW1, under cross-examination went on to admit that works at the site had indeed been ‘suspended’ in early October 2008 but there was no evidence forthcoming from him as to when the works were resumed or proceeded with after that suspension.

I DW1 for the defendant on the other hand maintained that there was no works carried out on site by the plaintiff from about early October 2008 at all. Although a few, about five foreign labour of the plaintiff were initially on site about that time, (as they claimed that they had not been paid by the plaintiff), there were no further works executed by the plaintiff.

[14] In as much as there was an admission by the PW1 that there was in fact a 'suspension' of works, it was incumbent upon the plaintiff, in my assessment, to adduce evidence that the suspension was lifted and the works proceeded with, to justify any further payment under progress claims Nos 11–12 or even the progress claim-final. This would have been not difficult for the plaintiff to prove from their own records of works. This evidential burden was definitely upon the plaintiff to discharge to the satisfaction of the court that there were subcontracted works carried out by the plaintiff after October 2008.

The plaintiff's witness, PW3, admitted that plaintiff maintained records of all works actually done on site in respect of the subcontract and these were maintained by the plaintiff but such evidence which were clearly within the control of the plaintiff, was not produced by the plaintiff. The court was in the circumstances entitled to conclude that no such work after October 2008 was carried out by the plaintiff.

[15] I did not find any merits in the plaintiff's contention that they were justified in 'suspending' works as there was delay in certification or payment of their progress claim. This allegation was totally bereft of any truth too.

The plaintiff's progress claim No 10 (P1-D -CABD-2/ p 4) dated 22 September 2010 was certified and payment effected on 29 September 2008 (SPC No 10 - D8 dated 26 September 2008). (The proof of payment of the certified sum of RM83,020.58 was at p 9 of CABD3).

[16] The plaintiff also complained that the defendant was not entitled to make 'deductions' from the certified progress claims, the amounts shown against — 'Less — supply material/machinery/labour/advanced on behalf'. The plaintiff did not say or show that this type of deduction was something new and introduced only with the certification of the plaintiff's progress claim No 10. What was more telling against the plaintiff was the fact that such 'amounts' representing the deductions were maintained by the plaintiff themselves in their subsequent progress claims Nos 11–12 and even in the progress claim-final. Hence an admission as to the validity of such deduction by the defendant.

Such deduction for advances or assistance rendered or extended to the plaintiff by the defendant to better carry out the subcontracted works were legitimate deductions when certifications for payment were issued upon production of each progress claim. There was no serious issue raised by the plaintiff that, apart from earlier stages of the performance of the subcontract works, there were in fact advances made by the defendant towards procurement of material for the plaintiff's works (and other similar need) and the practice was to 'contra' such advances against payments to the plaintiff when certified subsequently.

[17] The supposedly increased value of subcontracted works as posted in

A progress claims Nos 11–12 and even in the progress claim-final (as against the respective dates of those claims) remained unsubstantiated on good and credible evidence, save the bare statements in the respective progress claims.

B [18] The analysis of the relevant progress claims submitted by the plaintiff (at D12), show that the cumulative value of the plaintiff's works completed (in percentage terms) as assessed by the plaintiff themselves in their progress claim No 10 (September 2008) was only 59.45%. This percentage seemed to have increased suddenly to 61.29% by 21 October 2008 (progress claim No 11) and to 78.50% by November/December 2008 (progress claim No 12). In the
C progress claim-final issued in September 2010 (which was the basis of the claim in this action for RM1,343,857.25) valued the supposedly completed work at 82.95% of the contracted value of works.

D The progress claim No 12 (dated 12 January 2009) was for payment of RM1,049,301.88 only and was stated to be cumulative to that date. As stated above, the progress claim-final (dated 22 September 2010) was for RM1,343,857.25 but there was no explanation adduced by the plaintiff either, why there was this marked increase in the alleged outstanding sum now claimed by the plaintiff as still due to them some two years down the line.

E [19] The plaintiff did not dispute the fact led through the defendant's witnesses that such remaining and incomplete subcontracted works (within the plaintiff's scope of works) after October 2008 had to be taken over and completed by the defendant by themselves or with assistance of other
F subcontractors on a piece-job basis.

In this regard, the defendant's written warnings to the plaintiff of 10 September 2008 and of 11 September 2008 followed by the further letter of 10 October 2008 (*amaran kelewatan kerja-kerja bangunan di tapak*) which bore the following statement:

G Ambil perhatian jika pihak tuan terus menyebabkan kelewatan, kami terpaksa mengambil langkah langkah mempercepatkan dan mengatur kerja kerja terse but tan pa merujuk kepada pihak tuan lagi dan segala kos berkenaan akan di kenakan kepada pihak tuan

H are significantly pertinent.

I [20] Conclusion on primary issue. The defendant's version of events overall was more inherently probable in my assessment of the evidence, than that contended for by the plaintiff.

In all the circumstances of the case it was always for the plaintiff to satisfy the court that the plaintiff had not abandoned the subcontract works in October 2008 and/or that the plaintiff had resumed the suspended subcontracted works.

There was no proof adduced by the plaintiff at all that any of the subcontract works were proceeded with after October 2008 to justify or form the basis of the purported plaintiff's claim that there was an increase as a matter of fact to the 59.45% completion of the value of works as assessed by the plaintiff themselves in their progress claim No 10 of September 2008.

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SUBSIDIARY ISSUE 1

[21] With reference to the plaintiff's claim denoted as 'overtime' claim in progress claim No 10, (or in the subsequent purported progress claims Nos 11–12 or even the progress claim-final, all of which maintain the same consistent quantum of RM24,738.64), the plaintiff's witnesses admitted that there was no express term in the 'letter of acceptance for construction and completion of building works' which entitled the plaintiff to be paid any 'overtime'.

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[22] To the contrary it was provided at cl 7(a) of the said letter of acceptance as follows:

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In the event the progress of work is delayed, the Contractor is required to increase his workforce or to extend working hours including working on Sundays & Public Holidays, or to take all necessary measures to mitigate any delays and to catch up with work schedule *all at the Contractor's own cost*.

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The plaintiff contended that they were verbally instructed to do 'overtime' work to keep with the schedule. The response of the defendant was that the plaintiff was behind time in carrying out their subcontracted works and such instructions to accelerate works to meet scheduled mile-stones in the work, did not give rise to a liability on the part of the defendant to pay the plaintiff. This was not by any measure additional work imposed on plaintiff by defendant as it was always within the scope of the plaintiff's subcontract terms.

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There was also sufficient contemporaneous correspondence which bore out the fact that the plaintiff from as early as about December 2007 (three to four months into the subcontract) was behind schedule in the progress of the subcontracted works.

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[23] I therefore found the defendant's argument that the plaintiff's instructions to carry out 'overtime' works to recover programmed works that had been delayed, did not give rise to an independent or lawful right to be compensated for such overtime expenses expended by the plaintiff. The defendant's position was justified, reasonable and acceptable in all the circumstances of the matter.

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- A The plaintiff's counsel appears to have abandoned this claim in any event as it was not raised or argued in the plaintiff's submission made at the close of the case.
- B [24] In any case there was no evidence of any previous payment under any of the earlier certified progress claims to warrant approval of such payment of 'overtime' claimed in the progress claim No 10, even if it was so incurred by the plaintiff on the basis of a quasi-contract or likely pursuant to a variation of the subcontract terms, if at all.
- C [25] Conclusion on subsidiary issue 1. Non-payment of 'overtime' claim was not a tenable ground for the plaintiff suspending or abandoning the subcontracted works in October 2008 in any case.
- D SUBSIDIARY ISSUE 2
- E [26] It was conceded by the defendant that the plaintiff's representative (PW1) was involved in the negotiations with Kementerian for adjustments to made to the contract value (correspondingly subcontract value as well) on account of 'price variation' or rather escalations of costs of certain materials as encountered by the construction industry at the material time.
- F The defendant was also not averse to pass on to the plaintiff *on a pro-rated basis only* any additional contract sum received on the contract overall as approved by the employer of the contract for the construction of the school, namely, the Kementerian, in respect of allowed adjustments for price escalation for specified construction material used in the contract.
- G [27] The subcontract between the plaintiff and the defendant (it bears repeating) was for a contract price of RM3.05m of which, as it stood when the plaintiff abandoned works in October 2008, the plaintiff by their own admission had only achieved a completed stage of completion of 59.45% of the total subcontract value.
- H The overall contract price between the defendant and the Kementerian for the total school construction project was RM16.3m.
- I [28] It was the uncontradicted testimony of DW1, that the items agreed by government for price variation were only for steel bars and certain materials related 'concrete' works. The certificate of practical completion for the whole project had only just recently been issued. The final amount that would be approved to the defendant as 'variation of price' adjustment in respect of this whole project was only to be known with certainty when the final account for the project was issued. This was at the time of trial in the final stages of assessment.

[29] It was shown that to date under *SPC No 10* (certified as against progress claim No 10 of the plaintiff), a sum of RM50,004.31 had been apportioned for the benefit of the plaintiff (as assessed in April 2008) *based on the prorated basis* with reference to the plaintiff stage of completed works and the proportion of the subcontract value in the context of the principal contract value for the whole project.

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There was a further sum of RM95,487.37 presently still due under the same formula to be released to the plaintiff but the defendant stated that they were withholding the same as 'we are not willing to pay the RM 95,497.37 since we have advanced monies for materials etc and need to contra this sum against monies recoverable from the plaintiff', testified DW1 (details of the calculations; D13).

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[30] I was of the view that the plaintiff's claim for any adjustment of subcontract value on account of approved 'variation of price' of materials was premature at this stage as the final account in respect of the overall project had not been issued to the defendant as yet. The plaintiff's entitlement to 'variation of price' in any case was only on a 'prorated' basis as discussed above and in any event subject to the defendant's overriding right to contra monies due to the defendant upon the settlement of the final accounts as between the plaintiff and defendant in respect of this subcontract.

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[31] The plaintiff had been approved RM50,004.31 (ie the prorated sum as was due as at April 2008) in SPC No 10 (as against plaintiff's progress claim No 10 (22 September 2008)). Any further claim the plaintiff had against the defendant on this ground was premature and contingent as explained above.

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Conclusion on subsidiary issue 2. This was also therefore not a lawful basis or provided sufficient justification for the plaintiff to 'suspend' or abandon the subcontracted works in September 2008, in the circumstances of this case.

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CONCLUSION

[32] It was not enough for the plaintiff to just produce 'progress claims Nos 10, 11, 12' and 'Final' in the face of the court and contend that the onus now was on the defendant to disprove them. In the context of the outright denial by the defendant of the plaintiff's claims and allegations in the plaint, it was incumbent upon the plaintiff to prove their case. It is apposite to be reminded of ss 101–103 of the Evidence Act 1950, which (omitting the illustrations) were in the following instructive terms:

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101 Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

- A** (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

ILLUSTRATIONS

- (a) ...
B (b) ...

102 On whom burden of proof lies

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

C ILLUSTRATIONS

- (a) ...
(b) ...
(c) ...

D 103 Burden of proof as to particular fact

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

E ILLUSTRATIONS

- (a) ...
(b) ...

- F** [33] After having given the due consideration to the testimony of witnesses and documentary evidence led at the trial, and the respective submission of counsel for the parties, in the result, it was my judgment that the plaintiff had failed to prove their case on a balance of probabilities against the defendant.

- G** [34] The plaintiff's case was accordingly dismissed with cost and the plaintiff ordered to pay the defendant costs fixed at RM25,000.

Claim dismissed with costs fixed at RM25,000.

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Reported by Kohila Nesan

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